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No. 180.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

SOUTHERN IOWA ELECTRIC COMPANY,
APPELLANT,

VS.

THE CITY OF CHARITON, IOWA, ET AL.,
APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF IOWA.

STATEMENT OF THE FACTS.

This suit was commenced by the Southern Iowa Electric Company to enjoin the City of Chariton, Iowa, and its officers from enforcing Section 3, establishing rates for the furnishing of electric current to consumers residing in the City of Chariton upon the claim that the revenues derived from the rates thus established were non-compensatory and violative of the Constitution of

the United States. The City of Chariton and its officers appeared and filed answer in effect admitting that the rates were non-compensatory but alleging that the ordinance in question constituted a contract binding the Southern Iowa Electric Company to continue to furnish service notwithstanding the non-compensatory character of the returns.

Upon order of court the case was set down for trial upon the issue presented by Count One of the answer, as to the validity of the contracts. The District Court dismissed the suit for want of equity holding that the ordinance pleaded by the Southern Iowa Electric Company constituted a contract between the company and the City of Chariton binding the company to furnish current at the rates prescribed in the ordinance regardless of whether such rates were, in fact, confiscatory (256 Fed. Rep. 929).

The facts as they appear from the record in the cause are as follows:

For sometime preceding the granting of the franchise in the ordinance involved in this suit the City of Chariton owned and operated an electric light plant, for the purpose of furnishing current for street lighting purposes and for consumers, resident of the city. It then became necessary for the City of Chariton to make provision for an increased supply of water and being unable to finance this proposition they proposed to make sale of its electric light plant. Negotiations were then entered into between the City of Chariton and one Ed-

win B. Perrigo which resulted in Mr. Perrigo submitting to the city a proposition whereby he proposes to pay to the city the sum of $65,000.00 for the electric light plant (p. Rec. 61). Accompanying this proposition Mr. Perrigo submitted the ordinance granting to him a franchise and also submitted the form of an agreement he was willing to make with the city for lighting the streets and pumping water (p. Rec. 63-64). This proposition was accepted by the city and subsequently the ordinance in question granting a franchise to Edwin B. Perrigo was passed by the City Council of the City of Chariton and approved by the mayor and the grant was accepted by the said Perrigo as required by Section 13.

The ordinance in question, granting to Edwin B. Perrigo, the right to acquire, construct and maintain an electric light plant in the City of Chariton and employ the streets and public places for distribution of current to consumers is as follows:

Be it ordained by the Mayor and City Council of the City of Chariton:

Section 1. That Edwin B. Perrigo, his heirs and assigns, and he and his assigns are hereafter referred to as grantee, be and hereby is and are granted the right and privilege, subject to the limitations herein specified to acquire, construct, own, operate and maintain lighting, heating and power plants or works in or adjacent to the City of Chariton, County of Lucas and State of Iowa; to lay, place and maintain conduits, mains and conductors, to erect and place poles, posts, brackets, wires, transformers or other requisite fixtures or apparatus, for the supplying or transmitting of

electricity for light, heat or power, and steam or hot water for heat or other purposes, in all or any of the streets, avenues, alleys, viaducts, subways and public grounds of the City of Chariton as they are now or may hereafter be laid out or exist within the present or feture limits of the city; to acquire and hold any and all real property, easements and rights necessarily to such ends and purposes; to produce electric current for light, heat and power and distribute same, and to produce steam or hot water for heating or other purposes and distribute same through said streets, avenues, alleys, viaducts, subways and public grounds of said city; to acquire, construct, maintain and operate such plants, structures and appurtenances as are necessary for the conducting and maintaining of such light, heat and power plants, together with all machinery and appliances necessary thereto; and for these purposes the grantee shall have the right to enter upon, through or under any street, avenue, alley, viaduct, subway or public ground for the purpose of removing any pavement or sidewalk therein, or thereon, and making any and all excavations necessary for the laying of conduits, conductors and mains, erecting poles and attachments and extending same; provided that such use of streets, alleys, avenues, viaducts, subways and public grounds be made with the least possible inconvenience to the inhabitants of said city, that said exacvations be protected by barricades when necessary and be lighted at night, and that all sidewalks, pavements and excavations be replaced by and at the expense of the grantee in as good condition as nearly as possible as they were before in, and without unnecessary delay.

Sec. 2. Said conduits, mains, conductors, posts, poles, brackets, wires and other apparatus and requirements, shall be erected and placed under the supervision of the proper city official, and

when practicable shall be placed in the alleys; and shall be placed so as not to interfere with the ordinary traffic on the streets, alleys and public grounds, nor with the flow of water in the gutters; and when placed in the paved streets the grantee shall restore the paving at once to as good condition as nearly as possible as the same was in before the work was done. Should any of the posts, poles, wires, conductors or appliances, authorized hereunder, become unsafe or a menace to public safety, the city council may by resolution declare the same unsafe and order them removed. The grantee shall hold the city free and harmless from any cause of action that may arise against it by reason of negligence, carelessness or misconduct of any agents or employees of the guarantee in the erection, maintenance or operation of said plants. Nothing in this ordinance shall be construed to allow the grantee to trim the trees growing on or extending into any street, alley or public ground without first obtaining the consent of the property owner or the proper city official.

Section 3. The grantee shall sell current at rates not to exceed for monthly consumption those named in the following schedules:

Lighting Rates.

1 to 50 K. W. H. 12 cents per K. W. H.
51 to 150 K. W. H. 11 cents per K. W. H.
151 to 300 K. W. H. 9 cents per K. W. H.
301 K. W. H. and over, 8 cents per K. W. H.

Power Rates.

Up to 100 K. W. H. 9 cents per K. W. H.

101 K. W. H. and up to 300 K. W. H. 8 cents per K. W. H.

301 K. W. H. and up to 500 K. W. H. 7 cents per K. W. H.

501 K. W. H. and up to 800 K. W. H. 6 cents per K. W. H.

801 K. W. H. and up to 1,000 K. W. H. 5 cents per K. W. H.

Over 1,000 K. W. H. Special contract.

Power rates to apply on motors above two horse power.

Meters shall be read monthly and charges made therefor; and a minimum charge of seventy-five cents per month shall be made for each meter connected where readings at the prevailing rates do not equal said sum.

No meter rent shall be charged.

Street Lighting Rates.

Overhead suspended hooded incandescent street lamps; for 60 candle power lamps or their equivalent, each per annum, $15.00.

For 80 candle power lamps or their equivalent, each per annum, $18.00.

Lamps to be lighted from dusk to dawn each night.

Payment for same to be made in twelve equal monthly installments.

The grantee shall at all times furnish and maintain said lamps.

For five lamp cluster posts, as now installed, each having one top lamp or 80 candle power, to be lighted from dusk to dawn each night, and four bottom lamps, each of approximately 45 candle power, to be lighted from dusk to eleven o'clock p. m. each night or the equivalent of the above in candle power, each post per annum $36.00.

Payment for same to be made in twelve equal monthly installments.

The grantee shall furnish lamp and globe renewals for said cluster posts.

Pumping Rates.

Per kilowatt hour on meter at pumping station, 4 cents.

This rate to include operating care of pump motor or motors and pumps.

The city to pay for supplies and repairs.

Section 4. The city shall have the privilege, upon request of the proper authorities, of using, without cost to it, the poles of the grantee for the purpose of maintaining an electric fire alarm or patrol system, so long as said fire alarm or patrol system does not interfere with the efficiency of the light, heat and power service of the grantee.

Section 5. A meter shall be installed on the premises of each consumer for the purpose of measuring the amount of electric current, heat or service furnished, which meter shall be supplied by the grantee; and the grantee shall at all times have free access to said meter for the purpose of reading, testing and repairing the same. A deposit of five dollars ($5.00) for each meter installed may be required by the grantee for each consumer, which deposit will be returned when service is discontinued and the customer's bill is paid.

Section 6. Whenever any one shall move, according to law, any building of such size as to interfere with the wires, poles, equipment, the grantee shall, upon receiving twenty-four hours' written notice, temporarily remove such wires, poles or equipment, but only upon being compensated for consequent expense or damage.

Section 7. Any person who shall interfere with, cut, injure, break, deface, damage or remove any of the meters, poles, wires, fixtures, conduits, conductors or property used in connection with the business of the grantee, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined

in a sum not to exceed one hundred dollars ($100.-00).

Section 8. The grantee if so required by said city, shall install electric service for either light or power in all cases where prospective consumers guarantee to install ten sixteen candle power lamps or their equivalent where the distance does not exceed three hundred feet from any existing line of grantee. The grantee shall furnish, without cost to customers, service wires to connect on the exterior of the customer's building with the wiring of customer's premises.

Section 9. The grantee, by accepting the provisions herein granted, assumes and agrees to erect and install inside the city limits of Chariton, within eighteen months from the date of acceptance hereof, a new light and power plant of sufficient size and capacity, adequate for the city's needs, and agrees to maintain, generate and furnish therefrom all of the electric current for light, heat and power used in said city and furnish to said City of Chariton and its inhabitants current of even and steady voltage for light and power and of such quality as shall be deemed first class, in every respect suitable for the needs of Chariton. Said light and power shall be available at all times, both day and night.

Section 10. The grantee is hereby given, without cost to him, the privilege of using and occupying the grounds whereon the present plant is situated for the operation of the present plant for a period of eighteen months, during the time grantee is erecting and installing the new plant as herein provided. At the end of eighteen months, or upon completion of said new plant grantee shall vacate said grounds and remove all equipment and buildings therefrom.

Section 11. The grantee, that is, said Perrigo and his assigns, shall have and possess all and sin-

gular the rights, privileges and benefits herein granted for and during a term of twenty-five years from and after the acceptance hereof by the grantee. At the expiration of the term herein granted the city shall have, and hereby reserves, the right to purchase the plant and all of its equipment acquired, or constructed under the provisions hereof, including the entire distribution system, and all property and rights and privileges of whatsoever description belonging to the grantee, upon giving to the grantee six months' prior notice in writing of its election to purchase and by paying the actual value of all thereof in cash; said value, if not agreed upon between the city and the grantee, to be determined by disinterested and competent appraisers, sworn to ascertain said value, one to be selected by the city and one by the grantee; and in the event the two appraisers so selected cannot agree they shall select a third; and the award of two shall be the award of the appraisers. During the existence of the term herein granted the city shall not purchase electric current from others than the grantee nor construct, acquire or operate any such plant or plants as are named or contemplated herein, or for any of the purposes named herein; and this inhibition shall be and operate as an inducement to the grantee to accept the provisions of this ordinance; and upon this inhibition the grantee may always rely.

Section 12. The grantee shall make a verified statement to the City Council, once a year when demanded, showing its gross and net earnings in the operations of its business under this franchise.

Section 13. The grantee shall within ten days after the passage and approval and ratification thereof by the electors of the city of this ordinance, all as provided by law, file a written acceptance hereof with the city clerk of the city; and in the event the grantee fails so to do no rights shall vest hereunder.

Section 14. This ordinance shall take effect and be in force from and after its passage, approval and ratification as provided by law.

The City of Chariton and the said Edwin B. Perrigo then entered into a written contract for the lighting of the streets of the city (pp. Rec. 63-64). Mr. Perrigo then paid to the city the sum of $65,000.00 and there was conveyed to him the city lighting plant with all of its appurtenances. Within thirty days after Mr. Perrigo acquired the lighting plant he transferred the property and assigned all of his rights under the franchise to the Southern Iowa Electric Company. This company then commenced the re-construction of the lighting plant and at the time of the commencement of this suit had an investment in the property aggregating $330,298.66.

The company found at the time this suit was commenced that its revenues derived under the rates established by Section 3 of the ordinance in question were insufficient to pay operating expenses and made application to the City Council of the City of Chariton requesting that it exercise its power to regulate and fix rates by the establishment of a schedule of rates that would return to the company a sufficient revenue for the payment of the expense of operation and a reasonable interest upon the investment and the said City Council refused to act upon this request, claiming that the franchise constituted a contract obligating the company to continue to furnish current upon the rates prescribed by Section 3, regardless of whether the returns were compensatory.

After the issues were joined by the filing of answer by the City of Chariton and its officers the District Court, by order (p. Rec. 50) directed that the case be set down for trial before the court upon the issue as to the validity of the contract and its effect. A doubt was expressed by the court as to whether or not the record was in shape to present the issues so that the question could be determined upon the pleadings under the provisions of equity Rule 29, and suggested that for the purpose of such trial an admission be made of record that the rates established by the ordinance were confiscatory. Pursuant to this suggestion of the court, the City of Chariton and its officers filed an amended and substituted answer (pp. 52-65), in count one of which defendant pleaded its reliance upon the ordinance in question as a binding contract, notwithstanding the rates established by Section 3 were confiscatory and in relation thereto alleged that the bill of complaint and amendment do not entitle the plaintiff to the relief demanded. The Southern Iowa Electric Company in its petition and amendments alleges that it owns and operates a well equipped and modern plant for generating electric energy in the City of Chariton under the terms of the franchise granted by the city to Edwin B. Perrigo, under the date of September 21, 1914, and within thirty (30) days thereafter assigned to this company. The ordinance in question is attached to the petition and by appropriate allegation made a part of it. It is further alleged in the petition that the City of Chariton, at the time of the adoption of the ordinance in question possessed the power to regulate and fix the rates to

be charged to consumers of electrical energy for light and power purposes within the corporate limits and that the power so vested in the City of Chariton was a continuing power imposing the duty upon said city to fix and regulate the rates to be charged by the furnisher of electrical energy at such an amount and rate as should be just, giving to the furnisher a sufficient return to meet all expenses and a reasonable profit compensating as interest on invested capital represented by the value of the equipment necessarily used and useful in carrying on the business; that in the exercise of this power the City of Chariton, on the 21st day of September, 1914, adopted Section 3 of the ordinance in question, fixing the maximum rate to be charged to all consumers. The petition specifically alleges the value of the property necessarily employed in rendering the service required of the company and the expense of operation, including only items of labor, material, taxes, depreciation and interest on bonds and notes representing borrowed money and that for the year 1917, the loss of the company was $2,042.37 and that for six months during 1918 the loss to the company was $3,745.17, and that such losses would attend the future operations of the plant.

It is further alleged that the company is and will be unable to pay the interest upon its borrowed capital, which is of less value than the fair value of the necessary equipment, and that such borrowed capital is a lien upon the property secured by mortgage which provides that the indebtedness secured thereby shall become due and subject the mortgage to foreclosure and authorize the ap-

pointment of a receiver unless the interest is paid; that such expense of interest can be met only by the borrowing of additional capital thereby increasing the amount of invested capital and that the company could not lawfully exact a return upon such increased capital.

The petition further alleges the power vested in the City of Chariton as a continuing power of legislation under the laws of the State of Iowa, to establish and fix rates for current furnished to customers, such as shall compensate for the service rendered and that Section 3 of the ordinance, by reason of changed conditions, fails to return a sufficient income to meet the expense of operation and that it is, in consequence, void and its enforcement would result in taking the property of plaintiff for public uses without just compensation and would result in the taking of the company's property without due process of law and would deny to the company the equal protection of the law. That the enforcement of Section 3 of said ordinance would require the company to furnish electric current to the City of Chariton and the inhabitants thereof for lighting and power purposes at a rate insufficient to pay the expense of carrying on the business, to-wit, the cost of labor and materials necessarily employed and would fail to give plaintiff any compensation for invested capital represented in actual value of the properties necessary for the furnishing of the service.

It is further alleged that the company has 1150 customers in the City of Chariton, each of whom pay but a small amount each month and that the expense of col-

lecting a higher rate from each would cost more than the amount of the bill; that the City Council of the City of Chariton refused to amend Section 3 of said ordinance claiming that it had a valid and binding contract with the company to furnish electric current to consumers residing within the City of Chariton, regardless of whether or not the returns were compensating for the expense of rendering the service. An injunction against the enforcement of Section 3 of the ordinance referred to was asked, together with a decree declaring said section 3 of said ordinance to be null and void and for general equitable relief.

Upon the presentation of the petition of the Southern Iowa Electric Company to the court an order was entered directing that the order of court, together with a copy of the bill, should be served upon the defendants and within five (5) days they should file any objections they might have to the issuance of the injunction prayed for.

Upon the 14th day of November, 1918, an order was entered by the court (pp. Rec. 20-21), restraining the enforcement of the ordinance in question, permitting the company to charge and receive rates not exceeding specifically stated rates alleged in the petition to be only sufficient to compensate, requiring the company to keep an account of all sums collected in excess of the rates established by ordinance and to give bond conditioned for re-payment of such excess sums, in the event of a decree sustaining the ordinance rates, which bond was given and the restraining order issued.

Upon the submission of the question involved in the pleadings, pursuant to the order of court hereinbefore referred to, judgment was entered dismissing the petition of the Southern Iowa Electric Company upon the finding, by the court that the ordinance in question constituted a valid and binding contract to furnish electric service upon the rates prescribed therein notwithstanding the fact that such rates were non-compensatory and confiscating and notwithstanding the finding of the court that rates were admitted by the City of Chariton to be non-compensatory (pp. 50-69, Rec.).

SPECIFICATIONS OF ERROR.

The United States District Court for the Southern District of Iowa, entering the decree of dismissal in this cause, erred as follows:

1.

The said court erred in ordering and decreeing the issue presented by count one of the defendant's amended and substituted answer, be tried and determined before proceeding with any of the defenses.

2.

The said court erred in overruling the request of plaintiff to proceed to the trial of the entire cause and to appoint a master to take the testimony upon all of the issues tendered by the petitioner for the determination of the court.

3.

The said court erred in refusing to permit the introduction of evidence in this cause upon the issue presented in plaintiff's bill and both counts of defendant's amended and substituted answer, thereby making it impossible to present the record of a full and complete trial upon all of the issues tendered by the pleadings for the consideration of the court upon this appeal.

4.

The said court erred in holding, concluding and decreeing that the rates specified in the ordinance adopted

by the City of Chariton, as the rates to be charged by plaintiff to consumers of electric current, constitute a valid and binding contract, regardless of the claim of the plaintiff and appellant that such specified rates are confiscatory.

5.

The said court erred in holding, concluding and decreeing that the maximum rates prescribed in the ordinance granting to the plaintiff the right to maintain and operate a system of lighting and to distribute electric current to consumers in the City of Chariton, constitute a valid contract, binding the plaintiff to charge rates not exceeding the rates therein prescribed for electric current furnished to consumers, for that the rates thus established by said ordinance constituted and was the exercise of a legislative power by the City of Chariton, under the provisions of Section 725 of the Code of 1897, as amended.

6.

The said court erred in holding, concluding and decreeing that the rates to be charged consumers for the furnishing of electric current by the defendants prescribed by ordinance authorizing plaintiff to maintain and operate an electric lighting system in the City of Chariton and to distribute current to consumers, constituted a contract binding upon plaintiff, because the City of Chariton did not possess the power to fix rates to be charged for the furnishing of electric current to consumers by contract, but possessed only the power of regulating and fixing such rates in the exercise of its legislative powers.

7.

The said court erred in holding, concluding and decreeing that the rates prescribed by the ordinance adopted by the City of Chariton limiting the charges to be made to consumers for electric current, were binding upon the plaintiff as a contract, even though such rates were not compensatory, for that the City of Chariton possessed only the power of regulation and control of rates, granted by Section 725 of the Code of 1897 and amendments thereto, and that such power was a continuing power.

8.

The said court erred in holding, concluding and decreeing that the power granted to cities in Iowa by the provisions of Section 725 of the Code of 1897 and amendments thereto, were not legislative powers obligating the exercise thereof to the end that the rates permitted to be charged by the plaintiff to consumers should be compensatory, for that the power granted by said section of the statute as a continuing power of legislation and the failure to exercise the same by increasing the rates permitted to be charged when the existing rates become non-compensatory, amounts to the taking of property without compensation in violation of the constitution.

9.

The said court erred in declining to hold, conclude and decree that the rates prescribed by the ordinance adopted by the City of Chariton and conceded by count

1 of its answer to be non-compensatory, were subject to attack under the provisions of the constitution of the United States, because the prescribing of such rates was an exercise of a legislative power by the City of Chariton.

10.

The said court erred in decreeing that the maximum rates prescribed by the ordinance granting the plaintiff the right to maintain and operate a system of lighting and to distribute electric current to consumers in the City of Chariton, constituted a valid contract binding plaintiff to charge not exceeding the rates therein prescribed and that the city had the power to enter into such binding contract fixing the maximum rates to be charged for such current so furnished.

11.

The court erred in decreeing that the City of Chariton, in prescribing the maximum rates to be charged for electric current furnished to consumers in an ordinance granting a franchise and the acceptance of the grant by the assignor of appellant, constituted a binding contract fixing the rates to be charged throughout the life of the franchise even though not compensatory; and that the city had then the power to make such a contract; and that the power of the city was not limited to a continuing power of government to regulate, fix and control the rates to be charged, which could not be abrogated in any manner whatever; and that it was not the

duty of the City of Chariton to exercise this legislative power of government, when the existing rates became and were non-compensatory, to fix and establish, by a raise thereof, rates which would be compensatory.

12.

The said court erred in holding, concluding and decreeing that the facts stated in the Bill of Complaint and amendments thereto, entitled the plaintiff and appellant to no relief whatever.

I.

The City of Chariton, in adopting the ordinance granting the franchise in question, including therein a section prescribing the maximum rates to be charged for current furnished to consumers, exercised its legislative power to regulate, control and fix rates under the provisions of Section 725 of the 1913 Supplement to the Code of Iowa, expressed the will of the city under the conditions then existing. The city did not then possess the power to abrogate the power of government delegated to it by the legislature of the state to regulate the rates to be charged in the future under changed conditions; and did not possess the power to enter into a binding contract to fix maximum rates to be charged throughout the life of the grant.

The act of a state, or an arm of a state, in fixing or regulating rates to be charged by a public serving company is the exercise of a power of government. This power of government can only be exercised directly by the Supreme Legislature, or indirectly through a governing sub-division of the state exercising a power expressly delegated to it by the Supreme Legislature of the state. A municipality or any sub-division of the state can certainly exercise only such powers as are conferred upon it by express legislative enactment, or such powers as arise by necessary implication as incidental to the powers expressly granted and such other powers as are indispensable to the purpose for which the par-

ticular municipal body was created. All such powers of government, resting primarily in the people, are vested in the state under the constitution and these powers can be delegated only when the legislative enactment by the state clearly, specifically and unmistakably grants the power; or when it must necessarily be implied; or when its exercise is indispensable for the carrying out of the purposes for which the municipal sub-division was created. This principle is thoroughly recognized and is so frequently found in the opinions of the courts, analyzing the powers and duties of the municipalities, that the citation of authorities is really unnecessary.

In the case of *Wm. Barnes* v. *The District of Columbia,* 91 U. S. 540 (542) the thought is expressed with clearness and precision:

> "A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the state. The Legislature may give it all the powers such a being is capable of receiving, making it a miniature state within its locality. Again; it may strip it of every power, leaving it a corporation in name only; and it may create and re-create these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the state, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the Legislature shall extend or contract the sphere of its action."

The circumstances attending the adoption of the ordinance in question and an analysis of the different sections thereof, presenting the basis of the authority of the city respecting each section other than section 3 (rate section) of the ordinance.

The history of this controversy commences with the adoption of an ordinance (p. 14 Rec.) by the City of Chariton, approved on the 21st day of September, 1914, granting to Edwin B. Perrigo and his assigns the right to acquire, maintain and operate an electric light and power plant in the City of Chariton. We believe an analysis of the different sections of this ordinance, the privileges and rights granted thereby, the obligations imposed, the authority reserved and penalties prescribed, will aid us in the construction of Section 3. We will direct the attention of the court to the sections of this ordinance, other than Section 3, at this time and refer to the statutes of Iowa in force at the time of this grant, upon which must rest the power of the city respecting the same. We will refrain from any treatment of Section 3, being the section in which maximum rates are prescribed, the real cause of the present controversy, for later consideration.

Section 1 of the ordinance, by its terms, purports to grant to said Edwin B. Perrigo and his assigns the right to acquire, maintain and operate an electric plant in the City of Chariton with distribution lines in, upon and throughout all the streets and public places of the city. This same legislative enactment, in Section 2, makes provision for the supervision by the city of the erection of all poles and wires in the streets, prohibits the erection of

poles at places that will obstruct ordinary traffic, and prescribes generally the conditions under which the distribution system shall be constructed and maintained. Section 4 (p. 16 Rec.) makes provision for the authority of the city to use the poles erected by the grantee for the wires of its electric fire alarm and patrol system. Section 5 (p. 16 Rec.) makes provision for the installation of a meter with which to measure the current, authorizing the company to exact a deposit for its security. Section 6 (p. 16 Rec.) makes provision for the temporary removal of poles and wires, obstructing the use of the streets for extraordinary though necessary purposes, such as moving buildings along these streets. Section 7 (p. 17 Rec.) declares it to be misdemeanor to cut, injure or damage the equipment, and provides a penalty for violation. Section 8 (p. 17 Rec.) directs that the grantee, when required by the city, shall install electric service where extension of transmission line is required, not exceeding 300 feet, and where the applicant will guarantee to consume a certain quantity. This section also makes provision for the connection of the customer's building with the transmission lines. Section 9 (p. 17 Rec.) makes provision for the erection of an adequate plant within eighteen months, making provision for continuous service day and night. Section 10 (p. 17 Rec.) gives to the grantee authority to use the city property, where the plant then owned by the city is located, for a period of eighteen months. Section 11 (p. 17 Rec.) makes provision for the continuance of the

grant for a period of twenty-five years, and further provides that the city may acquire the plant and establishes a method by which its value may be ascertained. This section also declares that the city shall not purchase current from others than the grantee during the period of the grant. Section 12 (p. 18 Rec.) requires that the grantee shall make a verified statement to the city council once each year, showing its gross and net earnings in the operation of the business. Section 13 (p. 18 Rec.) prescribes the time within which an acceptance of the grant shall be filed.

A careful reading of this ordinance, section by section, discloses the fact that some of the sections assume the form of contract, while others adopt the form of command and are in their nature legislative. It seems clear to us that the validity of any particular section of the ordinance must necessarily depend upon the nature of the power delegated to the city by the supreme legislature of the state. A municipality having only such powers as are conferred upon it by express legislative enactment, or such powers as arise by necessary implication as incidental to the powers expressly granted and, of course, such other powers as are indispensable to the purposes for which the grant is made, we should seek, in connection with each subject, the source of the power that will sustain the provision.

Referring, now, to Section 1 we will find the grant to Edwin B. Perrigo and his assigns to construct and maintain the electric system, while in Section 11 we find the limitation for the continuance of this grant to be twenty-

five years. At the time of the adoption of this ordinance, cities had the power to grant to private individuals the right to construct electric plants in the cities with a limitation that such grant should not exceed twenty-five years. The portion of Section 720 of the Supplement to the Code of 1913 applicable to this phase of the question is as follows:

> "Section 720. * * * They (cities) may also grant to individuals or private corporations the authority to erect and maintain such works or plants (electric light and power plants) for a term not more than twenty-five years, and may renew, amend or extend the terms of such grant; but no exclusive franchise shall be thus granted, amended, extended or renewed."

We find, therefore, in the provisions of Section 720, specific power is granted to cities in Iowa to authorize the use of the streets for the maintaining and operating of electric light and power plants. It is not questioned but that a municipality is necessarily entrusted with a duty of regulating the use of the public streets within the city in the interest of public travel. It is the duty, under the statutes of Iowa, to maintain the streets in a safe condition for general public travel, and the city is liable for damage caused by reason of the existence of obstructions. A transmission pole line, when constructed and maintained in a correct manner, is not an obstruction; but the poles might be so placed in a public street as to create a hazard and constitute a nuisapce. There then arises, certainly, by clear implication if not in fact by express grant resulting from correct construction, the power to exact, that the construction work in the streets

shall be carried on under the supervision of the city council. Clearly the conditions named in Section 1, relating to the manner of construction and maintenance of the pole line in the streets, are conditions the city would have the power to exact. This same power forms also a correct foundation for the provisions of Sec. 2, but we also have the authority in the city, under the provisions of Section 696, to exercise all necessary efforts to prevent injury and to abate nuisances.

In section 720 we observe the authority in the city to grant the use of the streets for the erection of the pole line required for the service contemplated by this ordinance. There is also granted to the cities of Iowa the power to regulate electric wires and poles, by reason of the provisions of Section 775, as follows:

> "Section 775. Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway and other electric wires, and the poles and other supports thereof, by general and uniform regulation, and provide the manner in which, and the places where, the same shall be placed upon, along or under the streets, roads, avenues, alleys and public places of such city or town."

This is a power of regulation and control, which when exercised, must be general and uniform. Specific authority, however, is given permitting the city to designate the places where poles may be set. It is to the interest of the city to eliminate as far as possible a duplication of pole lines, and to that end, there is sufficient authority for the condition found in Section 4, permit-

ting the city to use the poles of the grantee for its own purposes.

In Section 7 we find a penalty prescribed for acts that are declared to be criminal. A city having the power to grant the use of its streets for the necessary purposes of furnishing light to the city and light and power to the inhabitants must necessarily have the power to protect the equipment to the end that the service may be efficiently given. We need not, however, resort to the rule permitting the implication of power in order to sustain this provision. Section 680 of the Code deals with this subject and, insofar as the same is applicable to the question involved, is as follows:

> "Sec. 680. Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

The question involved has received the attention of the Supreme Court of Iowa in the case of *City of Tipton v. Tipton Light & Heating Co.*, 176 Ia. 224 (227), in which the authority to enforce obedience to the provisions in an ordinance granting a lighting franchise was sustained.

Referring, now, to Section 8 of the ordinance, we find provision for the extension of lines, the building of service lines into the property of consumers and from the street. Insofar as this section of the ordinance may be said to require the furnishing of service to prospective consumers along the pole line of the grantee, it is but a recognition of the continuing power the city possesses under Section 725 of the Code, or the immediate exercise of that power in the fixing of the rules and regulations under which such service shall be granted. The portion of Section 725 pertinent to our present inquiry is as follows:

> "Sec. 725. They (cities) shall have power to require every individual or private corporation operating such works or plant (light and power), subject to reasonable rules and regulations, to furnish any person applying therefor, along the lines of its * * * wires * * * with * * * light or power, and to supply said city or town with light or power."

It will be observed that this section of the statute grants to the municipality a continuing power to require the rendition of service, "subject to reasonable rules and regulations," to inhabitants; and the continuing power to require the furnishing of light and power to the city. No one will contend, surely, that the city could exhaust its power in either of these respects by a single exercise thereof. It is clearly the grant of a power of a continuing nature to be exercised from time to time as conditions making it necessary and proper may arise. When you look at Section 8 of the ordinance, however, and the por-

tion of that section which applies to the giving of service to the inhabitants, you will find that it deals with two phases of the subject; first, the prescribing of conditions upon which the line will be extended for patrons; and, second, the requirement that the company shall construct service lines into the property of consumers. Under the provisions of Section 725 we find a restriction upon the exercise of the power to require service to inhabitants, in that the application must be for service along the line of the public serving company. Such a restriction must be given the force it was intended to have by the Legislature. However, the general object the city has in making the grant is to provide a means whereby the inhabitants can obtain power and light. The authority for making this general grant is, as we have seen, found in Section 720 of the Code. It is quite clear, then, that the city having the power to make the grant and a correct object being to furnish the inhabitants with the service contemplated, we are authorized in implying a power to fix conditions upon which such grant shall be made, provided such conditions do not run counter to any limitation upon power. Under the specific provision of Section 725 of the Code the city cannot "abridge, by ordinance, resolution or contract," the power to require service to be rendered to inhabitants applying therefor along the lines of wires. This positive prohibition against the abridgment of this continuing power is not violated by the condition imposing the obligation for extensions.

As we have seen, Section 720 grants the power to give to private persons and corporations authority to con-

struct and maintain electric light and power systems in a city. Section 9 of the ordinance makes provision for an adequate system with service available both day and night. Certainly the power to grant authority to erect a lighting system carries with it a power to exact, as a condition, that the system installed shall be adequate to the needs of the city and its inhabitants.

Turning, now, to Section 11 of the ordinance, we find provision made for the limitation upon the period of the grant, which is in strict accord with the statute. It also provides for the acquisition of the plant by the city. Authority for this is found in Section 720 of the Code, and a portion thereof pertinent to this inquiry is as follows:

> Sec. 720. "They (cities) shall have power to purchase, establish, erect, maintain and operate within or without the corporate limits of any city or town * * * electric light or electric power plants, with all necessary * * * poles, wires, * * * and other requisites of said works or plants * * *."

We, find, therefore, that the city has the power to purchase; and that being true, it necessarily follows that the city has authority to arrange the terms upon which the purchase shall be made.

It will serve no correct purpose to go into the question of validity of the last sentence of Section 11 of the ordinance at this time. The statutes of this state specifically authorize the making of contracts for the lighting of streets and provide for the raising of revenue to meet such contracts. It is true the cities would not have the

power to abridge by contract the power given to them to acquire lighting plants. However, the making of provision for the lighting of streets is the exercise of a power of business; and whether or not there is a conflict upon this subject, respecting the last sentence in Section 11, will not profit us at this time.

The provision of Section 12 requiring the presentation of verified statements once each year, showing the gross and net earnings of a business operated under this franchise, is pertinent to a construction of Section 3, and this will be treated under the analysis of that section.

Under the statutes of Iowa, the City of Chariton did not have the power to agree upon maximum rates to be charged throughout the life of the grant, but it possessed the continuing power to regulate, control and fix rates that should be at all times compensatory and this power it could not abridge by contract or otherwise.

With these observations respecting sections of the ordinance other than Section 3, I will now direct my attention to that section of the ordinance and the questions specifically involved in the controversy. It is the contention of the City of Chariton, and with this contention the District Court of the United States felt constrained to concur, that at the time of the adoption of this ordinance, the city had authority to enter into a contract with the assignor of the Southern Iowa Electric Company, fixing the maximum rates that should be charged for service during the life of the franchise and that Section 3 of the ordinance constitutes such a contract. It is our position, that the city had not the authority to establish permanent

rates for service rendered by electric companies, by contract, but that its powers were specifically limited to a continuing power of regulation and control. It is also our position that it was not intended, by the City of Chariton, that Section 3 should constitute a contract establishing the maximum rates to be charged throughout the life of the grant and that the same is not, in fact, such a contract. It is clear that cities of Iowa have only the powers specifically granted by express legislation, or necessarily implied as incidental to the powers expressly granted, or such powers as are indispensable to the carrying out of the objects and purposes for which the city is created. For a correct determination of the question of whether or not the City of Chariton, on the 21st day of September, 1914, possessed the power to enter into a contract fixing the maximum rates to be charged, it is necessary that we look to the legislation granting powers to cities in Iowa and in force at this particular date. It is also important to view the preceding legislation upon this same subject and carry such legislation through its process of evolution and take into consideration the views expressed by our own courts upon this subject.

It is recognized that water, heat and light are essentials and that cities may be given and may receive, the authority to provide the same for the inhabitants of the municipality and for its own use. In the early days in Iowa, even the furnishing of water did not command the serious attention of the legislative powers of the state, for the reason that this necessity of life was easily acquired by the individual. It is undoubtedly, because of

this reason that legislation upon this important subject is not found in the Iowa Code until 1873. The matter of gas appears to have been more or less of a luxury, and did not receive attention until even a later date. The subject of electric current and its uses for light and power purposes did not receive attention from the Legislature of Iowa until an Act was passed by the 22nd General Assemply and approved on the 8th day of April, 1888. In Iowa the subjects of water, gas and electric current insofar as the same may be said to affect the problems under examination, are now treated together.

An analysis of the Legislation of the State of Iowa delegating to municipalities, powers respecting the rates to be charged by public serving companies, presenting the history and evolution of such legislation.

It is therefore necessary that we shall commence our inquiry with the state of the legislation upon this subject, which at the beginning, deals only with the subjects of water. In the Iowa Code of 1873, Title IV is denominated as "Relating to County, Township, Town and City Government." Chapter 10 of this title of the Code of 1873, has the following heading: "Of Cities and Incorporated Towns." The only sections found in this chapter, or any place in the Code, relating to the subject and now essential for our inquiry, are sections 471, 473 and 475, as follows:

> "Sec. 471. They shall have power to erect waterworks, or authorize the erection of the same; but no such works shall be erected or authorized until a majority of the voters of the city or town

at a general or special election of four-fifths of the members of the council or board of trustees thereof, by vote, approve the same.

Sec. 473. When the right to build and operate such works is granted to private individuals or incorporated companies by said cities and towns, they may make such grant to inure for a term of not more than twenty-five years, and authorize such individuals or company to charge and collect from each person supplied by them with water, such water rent as may be agreed upon between said person or corporation so building said works, and said city or town; and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties.

Sec. 475. All cities and incorporated towns constructing such works are authorized to assess from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water, such water rents as may be agree upon; and at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the taxes, now authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water rents hereby authorized, shall be sufficient to pay the expenses of running and operating such works, and if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water for any purpose, such city or town

shall levy each year, and cause to be collected, a special tax as provided for above sufficient to pay off such water rents so agreed to be paid to said individual or company constructing said works; *provided*, however, that said tax shall not exceed the sum of five mills on the dollar for any one year, nor shall the same be levied upon the taxable property of said city or town which lies wholly without the limits of the benefit or protection of such works, which limit shall be fixed by the city council or board of trustees each year before making said levy."

Section 471 of the Code of 1873, clearly gives to cities and towns in Iowa the power to erect water works or to authorize the erection of the same by any person or private corporation. We find in Section 473 a definite and specific grant of power to the cities of Iowa, to authorize individuals or incorporated companies to whom authority has been given by the city to construct and operate waterworks, "to charge and collect from each person supplied by them with water, such water rent *as may be agreed upon between said person or corporation so building said works, and said city or town.*" The city is also specifically authorized and empowered to *"enter into a contract with the individual or company* constructing said works, to supply said city or town with water" for any of its essential purposes. In a new and developing country, especially respecting a subject not generally recognized in that country as an essential, capital could not be induced to embark in an enterprise without an assured profit. Under such circumstances, for the new enterprise, the profit could be best assured when the in-

come might be determined from valid contracts. Iowa was the first state in the Union to recognize that the charges of a public serving company was a proper subject of regulation and control. However, in the earlier days, it recognized the necessities of the beginner in a new field and prescribed the method of contract, as the means whereby, public serving companies and individuals could receive their income. The citation of authorities presenting the views of the courts of the county upon this interesting subject are of but little importance unless we have in mind, all of the time, the particular legislation that is the subject of construction.

The sections of the Code of 1873, above referred to remained unchanged until the enactments found in the proceedings of the 22nd General Assembly. We find in Chapter 26 of the Acts of the 22nd General Assembly approved April 3, 1888, an amendment to Section 471, which struck out of the fourth and fifth lines of that section the following words: "or four-fifths of the members of the Council or Board of Trustees thereof." This amendment has but little pertinency to our present inquiry. An examination of Section 471 discloses that this amendment deals with a restriction upon the power of cities and towns to erect or authorize the erection of waterworks. In Section 471 this power originally granted to cities and towns was restricted by the provision, that it should not be exercised unless a majority of the voters authorized it or unless four-fifths of the members of the council approved it. The amendment to this section, found in Chapter 26 of the 22nd General Assembly

above referred to, left this limitation upon the power of cities so that they could not erect or authorize the erection of water works without the consent of a majority of the voters. This limitation upon the exercise of this important power has continued to remain in the legislation of this state and the manner of its exercise has, from time to time, been further regulated by legislation. The 22nd General Assembly further amended Section 471 of the Code of 1873, and also amended Sections 473 and 475 by what is known as Chapter 11, as follows:

> *Be it Enacted by the General Assembly of the State of Iowa*:
>
> Section 1. That Section 471 of the Code of 1873 be and the same is hereby amended by inserting in the first line thereof, after the word "works" the following words, "or to establish and maintain gas works, or electric light plants, with all the necessary poles, wire, burners and other requisites of said gas works or electric light plants.
>
> Sec. 2. That Sections 472, 473, 474 and 475 of the Code of 1873 shall be held to apply to the establishment and maintainance (maintenance) of gas works and electric light plants as fully as they do to the erection of water works.

This Act was approved on the 9th day of April, 1888, and became effective, under the provisions of Section 5 thereof, upon its publication which took place on the 12th day of April, 1888. It will be seen therefore that until the 12th day of April, 1888, there was not given to cities and towns in Iowa, the power to authorize the erection and maintenance of electric light plants. When we analyze Section 473 of the Code of 1873, as

amended by Chapter 11 of the Acts of the 22nd General Assembly above quoted, we find there is then given to cities and towns in Iowa the power to authorize individuals or companies "to charge and collect from each person supplied by them" with electric current, such rentals *"as may be agreed upon between them."* Thus far we find that under the legislation of Iowa there is granted to cities and towns the power to authorize the construction and maintenance of electric light plants and to authorize the person or company operating such plants *to contract with consumers and with cities* for service rendered. As throwing light upon another enactment by the 22nd General Assembly, affecting the powers of cities and towns respecting public utilities, it is interesting to observe, that it was the 22nd General Assembly of Iowa that established the Board of Railroad Commissioners and made provision for the regulation of railways, by the state. Public thought in its evolution, had by this time broken away from the old theory of the private right of a public serving company to arbitrarily fix its own tariffs, and comprehended the powers of regulation possessed by Government. Now, directing the attention again to the existing legislation respecting the powers of cities, relating to the question of rates to be collected by electric light companies, we find that up to this point all cities, regardless of size, had authority to contract with serving companies for particular rates and did not have the continuing power to regulate, fix or control rates. The 22nd General Assembly as a further expression of advancing thought in legislation, gave to cities in Iowa

of the *first class*, and cities of the *second class, "having over 7,000 inhabitants"* and all cities organized under special charters, the power to regulate, fix and control rates to be charged by electric light companies. This is found in Chap. 16 of the Acts of the 22nd General Assembly, which was approved on the 10th day of April, 1888, and went into effect, under the provisions of the Constitution, on the 4th day of July, 1888. The Act authorizes the regulation of other lines of business affecting the public and insofar as it reflects the legislative thought of that day, the entire act is interesting, but the portions thereof pertinent to our inquiry are as follows:

> *Be it Enacted by the General Assembly of the State of Iowa*:
>
> Section 1. That all cities of the first class and cities of the second class, having over 7,000 inhabitants, and cities organized under special charters in this state in addition to the powers now granted, shall have the further and additional power conferred by this Act, as follows, to-wit: * * * to regulate telegraph, telephone, electric light, district telegraph and other electric wires, and provide the manner in which, and places where the same shall be placed upon, along or under the streets and alleys of such city; to regulate the price of gas, electric light, water rates, and to regulate and fix the charges for water meters, gas meters, electric light meters, or any other device or means necessary for determining the consumption of gas, water or electric light. This shall not be construed to authorize the passage of an ordinance or resolution or the making of any contract, whereby the above powers are abridged."

This Act is entitled as "An Act granting additional powers to certain cities of the first class, and to cities organized under special charters and cities of the second class having over 7,000 inhabitants." It will also be observed in the context of section one, that by specific terms, it is intended as a grant of "additional powers." This is a clear recognition that up to the time of this enactment, cities and towns in Iowa did not have the authority therein granted, that is the authority to fix and regulate electric rates. It is also a specific recognition that up to that time the public serving company could contract with a city for permanent rates. It will thus be seen that up to July 4, 1888, all cities and towns in Iowa had authority to authorize the fixing of water rates by contracts between the furnisher and the consumer or municipality. It also appears, that from the 12th day of April, 1888, when Chapter 11 of the Acts of the 22nd General Assembly took effect, up until the 4th day of July, 1888, all cities of Iowa, regardless of classification or size, *had a right to authorize contracts between the furnisher and consumer of electric current.* It will also appear, from the foregoing legislation, that after July 4, 1888, when Chapter 16 of the 22nd General Assembly became effective, all cities of the second class having a population *of less than* 7,000 and *all towns* in Iowa could authorize the making of contracts between the furnisher and consumer of electric current, but that all cities of the *first class* and all cities of the *second class having a population of over* 7,000, had the power to regulate and control the charges to be made by the furnisher to

the consumer of electric current and that this power could not be "abridged" by contract, ordinance or otherwise.

Permit me in this connection to direct further attention to the last sentence of Chapter 16 of the Act of the 22nd General Assembly. As we have seen, this is the first legislative enactment by the State of Iowa authorizing any municipality in Iowa to *regulate the price* to be charged for electric current. The last sentence of this Act of the legislature specifically provides that the Act shall not be construed "to authorize the passage of an ordinance or resolution or the making of any contract, whereby the above powers are abridged." This clearly was intended as a limitation upon the powers granted to cities. It clearly means that all cities receiving this power should not abridge the power in any manner whatsoever. It then necessarily follows that from July 4, 1888, all cities of the first class, and all cities of the second class having a population of over 7,000 could not in any manner whatsoever abridge the power granted to them, to regulate the price to be paid for electric current. In the case of *Town of Woodward et al.* v. *Iowa Railway & Light Company*, 178 N. W. 549, this question was considered by our Supreme Court and this very point treated as follows:

> "There *was a time* in the history of our legislation when the right *to contract as to rates* was conferred by statute upon the City Council. A comparison of certain sections in the Code of 1873 with our present Section 725 is instructive on this question. * * * By Chapter 16-22d G. A. this

right of contract by the City Council *was taken away* from cities having a population of 7,000 or more, but *was still permitted* to cities of lesser population."

The foregoing outline presents the state of the legislation in Iowa upon this subject until the adoption of the Code of 1897. With the adoption of the Code of 1897, Sections 471, 473 and 475, as they appeared in the Code of 1873, together with the subsequent amendments thereof, were dropped from the Code and in consequence were repealed. All of the legislation upon this subject, in any manner affecting the question under examination, is presented in Sections 720 and 725 of the 1913 Supplement to the Code. These sections, together with all amendments in force on the 21st day of September, 1914, the time of the adoption of the ordinance in question by the City of Chariton, is presented in the following copies. We omit the portions having no application to the subject under examination.

> Section 720. They (cities and towns) shall have power to purchase, establish, erect, maintain and operate, within or without the corporate limits of any city or town, heating plants, water works, gas works or electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants and lease or sell the same. They may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, and may renew, amend or extend the

term of such grant; but no exclusive franchise shall be thus granted, amended, extended or renewed. * * * no such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise extended or renewed, or amended, or contract of purchase entered into, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election.

Sec. 725. They (cities and towns) shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires or other conduits, with gas, heat, water, light or power, and to supply said city or town with water for fire protection, and with gas, heat, water, light or power for other necessary purposes, and to regulate and fix the rent or rates for water, gas, heat and electric light or power; to regulate and fix charges for water meters, gas meters, electric light or power meters, or other devices or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution or contract."

We have carried the analysis of the legislation upon this subject with perhaps greater detail than is necessary, and yet, it has seemed to us that the history of the legislation upon this subject will aid in reaching a correct construction of existing statutes. It is now important for us to examine the opinions of the highest court of our state upon this subject.

The Supreme Court of Iowa, construing Section 725 of the Code, by unbroken line of decisions, holds that cities have not the power to fix, by contract, the maximum rates to be charged for electric current; but that the power granted is a continuing power to regulate rates, which power must not be abridged by contract.

The Supreme Court of Iowa, in construing Section 473 of the Code of 1873, held that the power given by that section authorized the fixing of a binding rate *by contract* and that a provision found in the ordinance, granting to a public serving corporation a franchise, purporting to fix maximum rates, constituted a valid and binding contract. The case of *Independent School District of Le Mars, Iowa* v. *The Le Mars City Water & Light Company et al.*, 131 Iowa, 14, deals with this question of statutory construction. In that case the ordinance was adopted on the 1st day of October, 1888. We must bear in mind that the City of Le Mars was then and ever since has been a city of the second class, having a population of less than 7,000. At the time of the passage of this ordinance the statutes of Iowa, as above indicated, *authorized cities of more than 7,000 people to regulate and fix rates*, but that cities of the second class of *less than 7,000 people had no other method of fixing rates than by contract.* In the ordinance granting to the Le Mars Company the right to maintain and operate a water system we find Section 15 which deals with rates, as follows:

> "The following shall be the maximum water rates to be charged annually by the grantee, his heirs or assigns for the use of water until changed as hereinafter provided."

Following this clause, was set forth a long schedule enumerating the maximum rates to be charged and this included the obligation to furnish school buildings with free water. In 1904 the water company declined to furnish the Independent School District with water in accordance with the terms of the ordinance and this action seeking a writ of mandamus was commenced and the water company filed a demurrer to the petition. In the opinion, the Supreme Court sets out the provisions of Section 473 of the Code of 1873, under which the grant was made and then says on page 17:

> "This statute gave the City of Le Mars the right to contract not only for water for municipal purposes, but for the rate which should be charged other consumers thereof. The express power thus granted was to be exercised by the city in the interests and for the benefit of the inhabitants of the city who might wish to become patrons of a water plant erected by an individual or a corporation, and included within its purview of consumers, whether such consumers might be individuals or corporations, secular or religious. That ordinance and its acceptance by Dunn constituted a contract binding him and the city, as stated therein, cannot be successfully questioned. *Cedar Rapids Water Company* v. *Cedar Rapids*, 118 Iowa 234."

It is not questioned but that under the provisions of Section 473 referred to, there was given the specific authority to the city to enter into a binding contract respecting rates. Statutes somewhat less specific in their directions were before the Supreme Court of the United States in the cases of *Detroit* v. *Citizen's Street Railway*, 184 U. S. 368; *Cleveland* v. *Cleveland City Railway*

Company, 194, U. S. 517; *Columbus Railway Power & Light Company* v. *City of Columbus*, 249 U. S. 399 and other cases. In all cases dealing with this phase of the subject, it is recognized that the power of the city to fix rates by contract must depend upon the statutes of the state purporting to grant power to the municipality. An examination of the statutes of Michigan and Ohio shows the authority in the city to make such contracts not seriously different, though less specific than is found in Section 473 of the Iowa Code of 1873. In the case of *Columbus Railway & Light Company* v. *Columbus*, *supra*, we find the following:

> "Whether these ordinances constituted such contracts depends upon the proper construction of the statutes of Ohio in force at the time, and the terms of the ordinance in question.
>
> It is conceded that the statutes of Ohio regulating this matter are substantially the same as those set forth in the margin of the report of the decision of this court in *Cleveland* v. *Cleveland City R. Co.*, 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756. After the consideration therein given them, it would be superfluous to state them again or to undertake to repeat the reasons which impelled the decision of the court. In the Cleveland case this court held that upon acceptance of the ordinance it became a binding contract, governed by the rates of fare authorized to be charged during the period of twenty-five years for which the ordinance ran; that the rates contracted for became binding upon the city, and could not be altered by subsequent municipal action consistently with the constitutional rights of the railway company."

In all of these cases decided by the Supreme Court of the United States, just as in the Iowa case, *Independent District of Le Mars* v. *Le Mars Light & Water Company, supra*, the statute authorized the municipality to make such a contract and the ordinance involved in them constituted a contract. We now find that since the ordinance involved in the Le Mars case was passed, the Legislature of the State of Iowa withdrew the power to make a contract respecting rates and under the provisions of Section 725 above quoted, conferred the power upon cities to regulate and fix such rates with an absolute prohibition that such powers "shall not be abridged by ordinance, resolution or contract." The very fact that there existed in this state at one time a power giving to municipal corporations authority to make contracts respecting rates and that the statute giving such power was repealed, substituting a statute authorizing the municipality to fix and regulate such rates, accompanied by the prohibition above stated, clearly indicates that the Legislature of Iowa intended there should be no mistake but that the power of municipalities to make such contracts should be withdrawn. The Supreme Court of Iowa has had occasion to pass specifically and directly upon this question in several cases.

In the case of *City of Tipton* v. *Tipton Light & Heating Company*, 176 Iowa, 224, we find the defendant appealing from a judgment of the District Court imposing a fine for violating a city ordinance, prohibiting it from charging more than the amount fixed by an ordinance for the furnishing of electric light and power.

In the opinion the court says, after quoting literally Section 725 of the Code of 1897 on page 227:

> "The right of the state to delegate to municipalities the powers therein conferred is not questioned. The right of the city to exercise these powers when delegated is not questioned. There is no claim that the provisions of the ordinance fixing the rates are unreasonable. The passage of the ordinance is a legislative act. It is presumed to be reasonable until the contrary appears. That the defendant violated the ordinance is admitted.
>
> The first question then is: Was the passage of this ordinance a fair exercise of the delegated power of the city? * * * This statute gives to cities the power of regulate and fix rates for water, gas, etc., and gives to it power to regulate and fix charges for gas meters, etc., used for determining the amount of water, gas, etc., consumed."

Again in the same opinion on page 239 we find the following:

> "A distinction must be kept in mind between the power to regulate rates and the power to contract as to rates. The regulation of rates for public service belongs to the police power of the state, and, when delegated to the city, it belongs to the police power of the city. The power to regulate has been delegated by express terms, and, under this police power, the city has a right to punish one who violates an ordinance fixing and regulating the charge to be made for public services rendered."

In the case of *Iowa Railway & Light Company* v. *Jones Auto Company et al.*, 182 Iowa 982, we find an action by the company to recover for heat furnished to a consumer. On March 27th, 1911, the City of Perry

adopted the ordinance involved in this case, granting a franchise and which ordinance contained a regulation respecting rates, as follows, on page 984:

> "Section 6. The price to be charged for electricity furnished private consumers for lighting purposes, under and by virtue of this grant, shall not exceed one cent per hour for each sixteen candle power incandescent light, or the said Perry Electric Light, Power & Heating Company, may at its option install a system of meters and the rates charged to private consumers by meter shall not be to exceed the following (Then follows schedule of rates):

In the opinion and appearing on page 985 there is set out a copy of Section 8 of this ordinance which purports to reserve unto the city the power to regulate and fix the rates prescribed in Section 6. The court adds:

> This latter (referring to Section 8 of ordinance) added nothing to Section 725 of the Code Supplement, 1913, which declares that:

The opinion then sets out in full Section 725 of Code Supplement, 1913:

On page 990 the court says:

> "The franchise granted by said ordinance was subject to the power reserved in the City Council 'to regulate and fix the rent or rate for * * * heat,' and this might not be 'abridged by ordinance, resolution or contract.' Or, as is often said, the statute necessarily is read into the franchise and forms a part of it. Appellant expresses some doubt as to the meaning of the clause last quoted. Its manifest purpose is to forestall any attempt, by ordinances or resolution of the city, or through any

contract, to permanently or for any specified time fix the compensation for services rendered or material furnished. Whatever may have been the ordinance of the city in granting a franchise, or independent thereof, or resolution of the city council, or contract with city or private parties, the power is continued in the city council to regulate and fix the rates of compensation thereafter to be exacted. The power is a continuing one, and one city council may not tie up its successors by anything it may do in the matter covered by this statute. The granting of such a franchise is by the city council, even though its approval by the electors of the municipality is essential to its validity. Section 776, Code. And the rates for service therein specified are subject to subsequent adjustment as this may be deemed expedient or necessary by the city council. That the state has power to regulate and define charges to be exacted by public utility corporations is not questioned, nor is it doubted that such power may be delegated to municipal corporations."

It may be suggested that the meaning of this prohibition against the abridgment of the right to regulate and control by contract or otherwise, has no effect upon the right to fix the rates by contract binding upon the company only, but means that the city is not thereby bound. This thought must certainly be dispelled when we comprehend the purpose and full meaning of the power to regulate and control. This power cannot be abridged in the slightest degree and the city must be left with perfect freedom to *regulate up as well as down.*

In this case of *Iowa Railway & Light Company* v. *Jones Auto Company, supra,* the court further says, on page 992:

> "The authority to regulate and fix rates of compensation is not limited to reducing these. It includes the power to increase as well, and the city council may decrease or increase as may be necessary in determining these that shall be just and reasonable. Nor is it essential that change of rates by the city council shall rest upon some additional consideration. It is enough that the law has empowered that body to regulate and fix rates to be exacted, and the conditions of the franchise, with such authority reserved, are sufficient consideration, if any were necessary. * * * The method of regulation and fixing rates is not prescribed, and this being so, it was competent for the city council to exercise in its own way the power conferred." *Merchant's Union Barb Wire Company* v. *Chicago, B. & Q. R. Co.*, 70 Iowa 105; *Slocum* v. *City of North Platte*, 192 Fed. 252.

It seems clear to me that where the statute granting power to municipality does not give the power to fix rates by a binding contract but does give the power to fix and regulate such rates with a positive prohibition against the abridgment of this power in any manner whatever, that when the city does act upon this subject, it must be construed to have so acted in the exercise of its power to fix rates. The following sentence from the opinion in the Jones Auto Company case, with the authorities cited, clearly declares the rule in Iowa, that where there is no method prescribed for the exercise of a given power by municipalities the municipality may exercise that power in its own way:

> "The method of regulation and fixing rates is not prescribed, and this being so it was competent for the city council to exercise in its own way the power conferred."

In the case at bar the City of Chariton clearly exercised this power to fix rates by the adoption of Section 3 which by its very language discloses the purpose of the city to exercise that power:

> "Section 3. The grantee shall sell current at rates not to exceed for monthly consumption those named in the following schedule:

This question was again before the Supreme Court of Iowa in the case of *Town of Williams* v. *Iowa Falls Electric Company*, 170 N. W. 815. This opinion was filed by the Supreme Court on the 17th day of February, 1919, more than a month before the memorandum opinion was filed by the learned District Judge of the United States in this case. In the Town of Williams case, the ordinance granting to the Iowa Falls Electric Company prescribed maximum rates. Before the commencement of the case, the Iowa Falls Company notified its patrons, after the city had refused to raise the rates, that it would discontinue service unless the patrons were willing to pay an increase of 10 per cent above the maximum rates fixed in the ordinance. The Town of Williams then commenced an action in the District Court of the State and a temporary injunction was issued restraining the defendant from exacting the increased rates. A motion to dissolve the writ was denied and defendant appeals. In disposing of the appeal the Supreme Court said, on page 816:

> "The power to fix rates is purely governmental and legislative. So hold *Rogers Park Company* v. *Fergus*, 180 U. S. 624; *Home Telephone Com-*

pany v. *City*, 211 U. S. 265; *Tipton* v. *Light Company*, 176 Ia. 224; 3rd Dillon Mun. Co. (5th Ed.), Section 1325, and 4 McQuillin, Mun. Cor. Sections 1729, 1913, approved in the Tipton case. The fixing of rates by ordinance is in a sense an exercise of the police power. Wherefore a fine is enforceable for violating the provisions of the ordinance. * * *

The legislature can give power to a town to contract that rates fixed shall not be changed for a stated period, but authority 'to regulate and fix' rates does not authorize such a contract. Power to make a one can be given by unmistakable grant alone—, and without such grant, no (a) contract that rates shall be unalterable is valid. That has support in *Rosecrans* v. *U. S.*, 165 U. S. 263, and in *U. S.* v. *Jackson*, 143 Fed. at pages 787, 788. * * * This is so because enforcing such a one would, in whole or in part, extinguish an undoubted governmental power. So holds *Home Telephone Company* v. *City*, 211 U. S. 265. In this case no question can arise whether the power to make such contract has been granted because section 725, Code Supplement, 1913, expressly forbids making such a contract. That is the holding in Tipton's case, 176 Ia. 224, and in *Iowa County* v. *Jones*, 164 N. W. 780. The fixing of maximum rates in a franchise ordinance is therefore not a contract that such rates may not be changed before the time stated in such ordinance has lapsed. It has been held that approval of said rates by the approval of the franchise on the part of the electors is merely an approval of the rates fixed by the franchise as rates temporarily settled with distinct understanding that the council might change these rates either upwards or downward. *Iowa County* v. *Jones*, 164 N. W. 780, so holds. To like effect is *Rogers Park Company* v. *Fergus*, 180 U. S. 624.

The next proposition urged is that something that one party may change without the consent of

the other is not a contract. To this we have to say that, in rate cases, the proposition that nothing is in the true sense a contract unless there be a reciprocal obligation, and unless the alleged contract is binding on both, has the approval of numerous decisions in the Supreme Court of the United States, those of other Federal Courts, and all courts of last resort in many of our sister states.

. Next it is urged that this is not changed by any estoppel, arising from the fact that the service company has proceeded under the franchise grant. This is held in *State* v. *Chariton Telephone Company*, 173 Iowa 497, and in many decisions of the Supreme Court of the United States and all other courts of high standing. * * *

It follows there is no occasion for unalterable rates, since all rates must at all times be reasonable, fair, adequate, and non-confiscatory—since the municipality may not use its governmental powers to confiscate, nor the service company demand excessive rates.

In the last analysis, the contention of the appellant up to this point is that no contract, no estoppel, no ordinance, no refusal to amend an ordinance, stands, or can stand, in the way of raising the rates fixed by the plaintiff to a just rate, provided defendant can establish that the rates fixed by the ordinance of plaintiff are not now just, reasonable and fairly compensatory. As has been shown this proposition is well sustained by authority."

This question was again before the Supreme Court of Iowa in the case of *Selkirk* v. *Sioux City Gas & Electric Company*, 176 N. W. 301. This was an action in equity by a consumer, commenced on behalf of himself and other consumers to enjoin defendant from putting into effect and collecting increased gas rates under

an ordinance, amending a section in the ordinance granting to the company a franchise, which fixed the maximum rates. In that case the court held that the provision in the franchise ordinance did not constitute a contract and is ruled by the case of *Iowa Railway & Light Company* v. *Jones Auto Company* case, *supra*. This question was again before the Supreme Court of Iowa in the case of *Town of Woodward, et al.* v. *Iowa Ry. & Light Company*, 178 N. W. 549. In that case a franchise was granted to Iowa Railway & Light Company by the Town of Woodward in June, 1912, authorizing it to maintain an electric light plant in the town of Woodward. Section 6 of the ordinance granting the franchise specified the rates to be charged to consumers by similar language used in our franchise. The contention involved in the case was the claim of the Town of Woodward that the ordinance granting the franchise and prescribing rates, when accepted by the company, constituted a contract binding as such. The company resisted this contention and denies that there is any power conferred by statute upon the city council to enter into contract on the subject of rates. After the court sets out literally section 725 of the Code of 1897 the following appears:

> "It will be noted from the foregoing that the legislative power to fix rates is conferred by this section upon the city council. The legislative power thus conferred is a continuing one and may not be abridged or bartered away by contract or otherwise. The same legislative power to enact rates by ordinance is a continuing power to repeal

or amend in the same manner. The power thus conferred is subject only to the constitutional limitation that the rates thus enacted shall not be confiscatory or unreasonable but shall be reasonably compensatory. There was a time in the history of our legislation when the right of contract as to rates was conferred by statute upon the city council. A comparison of certain sections in the Code of 1873 with our present section 725 is instructive on that question."

In the opinion the court sets out in full section 473 of the Code of 1873 and proceeds with the following:

"By Chapter 16, 22d G. A. this right of contract by the city council was taken away from cities having a population of 7,000 or more but was still permitted to cities of lesser population. By the revision and codification of 1897, the right of contracts as to rates for utilities of this character was entirely eliminated and the legislative power to regulate rates was conferred upon the city council in all cases. The reason for the change of method is obvious enough. Under the contract method, the rights of the public were often bartered away either ignorantly or corruptly and utility corporations became empowered, through the contractual obligations, to enforce extortionate rates. The net result of the progressive legislation is found in our present section 725 whereby it is forbidden to any existing city council to bind the city to any rate for any future time. The power of regulating the rate is always in the present city council. It must be said, therefore, that the rates fixed by section 6 of the ordinance, hereinbefore referred to, were not fixed by contract."

This question is next before the Supreme Court of Iowa in the case of *Ottumwa Railway & Light Com-*

pany v. *City of Ottumwa*, 173 N. W. 270. In that case it appears, a franchise was granted by the City of Ottumwa in 1901 to the company and in the ordinance granting the franchise there was a provision fixing a maximum rate to be charged for fares. Because of the extraordinary conditions existing during the war the company appealed to the city council of the City of Ottumwa for an increased rate and this was refused. The company then established an increased rate and commenced this action seeking an injunction to restrain the city from interfering with its purposes. The opinion filed in this case clearly sustains our contentions that city councils do not have the right to contract respecting rates and that provisions of the franchise ordinance purporting to fix an established rate is but the exercise of the power of the city and cannot be construed as a contract.

It will be observed, upon inspection of section 725 of the Code, that Street Railways are not mentioned. Because of this fact the court holds that the section of the statute referred to has no application to street railways. The court further holds that by reason of a construction of the legislation upon this subject there exists the power vested in cities to contract respecting fares to *be charged by street railways* although this power *does not exist respecting rates to be charged by other companies*. Upon a petition for rehearing the opinion appearing in the 173 N. W. page 270 is withdrawn and the case now appears to be closed with the opinion found in vol. 178 N. W. page 905. The final opinion in this

case holds that even as to street railways cities do not have the power to contract fixing permanent rates. Upon the question before us the following language appearing on page 906 is pertinent:

> "If street railway corporations were dealt with in Section 725 of the Code of 1897, it would be beyond all question that it was error to dissolve said temporary injunction on the ground upon which it was dissolved. That statute in positive terms forbids any abridgment of the right to regulate and fix charges of service corporations named in the statute, either by ordinance, resolution, or contract. No one would now contend, in the teeth of the statute prohibition, that there can be a valid contract fixing permanent rates. As to corporations named in that statute we have held repeatedly that there can be no contracting, that rates fixed for service shall not be changed. See *Tipton* v. *Light Company*, 176 Iowa, 224, 157 N. W. 844; *Selkirk* v. *Gas Company*, 176 N. W. 301. And see *San Antonio Co.* v. *City* (D. C.), 257 Fed. 467. To like effect is *Iowa Co.* v. *Jones*, 182 Iowa, 982, 164 N. W. 780. And in the last case it is held that the fixing of maximum rates in a franchise ordinance is therefore not a contract that such rates may not be changed before the time stated in such ordinance has lapsed, and that approval by the electors of rates in the franchise is merely an approval of the rates fixed by the franchise, as rates temporarily settled, with the understanding that the same might be changed either upward or downward. And see *Rogers Park Co.* v. *Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702. • • •

(a) The power to fix rates is purely governmental and legislative, and in some aspects an exercise of the police power. *Rogers* v. *Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702; *Home Tele-*

phone Co. v. *City*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176; *Tipton* v. *Light Company*, 176 Iowa, 224, 157 N. W. 844; Dillon Mun. Corp. (5th Ed.) par. 1325; McQuillin Mun. Corp. par. 1729.

(b) This governmental power cannot be limited by contract, much less entirely abrogated by it, and it has no limitations, except that both parties must respectively permit and be satisfied with such rates as shall be just and reasonable *Iowa Co.* v. *Jones*, 182 Iowa, 982, 164 N. W. 780; *Tipton* v. *Light Co.*, 176 Iowa, 224, 157 N. W. 844; Abbott Municipal Corporations, par. 915, approved in the Tipton Case and *San Antonio Co.* v. *City* (D. C.), 257 Fed. 467; *City* v. *Gas Co.*, 81 App. Div. 505, 80 N. Y. Supp. 1093; *Rogers Park Co.* v. *Fergus*, 180 U. S. 624, 81 Sup. Ct. 490, 45 L. Ed. 702.

(c) That, if it were held a contract could provide for unalterable rates, its enforceability would, in whole or in part, extinguish an undoubted governmental power. *Home Telephone Co.* v. *City*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176.

In amplification it has been said that therefore there is no occasion for unalterable rates, since all rates must at all times be reasonable, fair, adequate, and non-confiscatory; that the governmental power may not be abridged by contract since the municipality may not use its governmental powers to confiscate, and, on the other hand, the service company may not demand excessive rates. *Rogers Park Co.* v. *Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702. In *City* v. *O'Connell*, 278 Ill. 606, 116 N. E. 215, the court said:

> 'No contract can be made which assumes to surrender or alienate a strictly governmental power, which is required to continue in existence for the welfare of the public.'

In fewer words the cases proceed on the general theory that it is against public policy to con-

> tract for unchanging rates; that there must be no such contract, because its enforcement might, on the one hand, fasten what proves to be an exorbitant charge upon the patrons or, on the other, prove a rate that will confiscate the property of the service corporation. While there are other lines of reasoning advanced in the authorities in the main and at the present time, the decisions run on the broad ground that public policy forbids such contracts, unless the Legislature, the ultimate judge of what is public policy, declares unmistakably that such contracts do not offend that policy. *Murray v. City*, 226 U. S. 318, 33 Sup. Ct. 107, 57 L. Ed. 239; *Ft. Smith Co. v. Ft. Smith* (D. C.), 202 Fed. 581."

The holding of the Supreme Court of the United States in construing statutes but not delegating the power to fix rates by contract, but granting the power to fix, regulate and control rates, is in accord with the declaration of the Iowa Supreme Court.

This court, however, has had occasion to pass upon the question involved in this controversy where the municipality was not possessed of the power to contract respecting rates but was possessed of the power to regulate rates. In *Home Telephone & Telegraph Company v. Los Angeles*, 211 U. S. 265, the cases on both sides of this problem are reviewed. Permit us to present the following quotation from this case:

> (276) It is urged that though authority to contract for the maintenance of rates is not expressed in the Act, it is necessarily implied from these provisions. But we are of the opinion that there is no such necessary implication, even if anything less than a clear and affirmative expression

would be a sufficient foundation upon which to rest an authority of this nature. The decisions of this court, upon which the appellant relies, where a contract of this kind was found and enforced, all show unmistakable legislative authority to enter into the contract.

On page 274 appears the following:

"The facts in this case which seem to us material upon the questions of authority of the city to contract for rates to be maintained during the term of the franchise are as follows: The charter gave to the Council the power 'by ordinance * * * to regulate telephone service * * * and use the telephones within the city * * * and to fix and determine the charges for telephones and telephone service and connections.'

This is an ample authority to exercise the Governmental power or regulating charges, but it is no authority to enter into a contract to abandon the Governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance 'to fix and determine the charges.' It authorized the exercise of the governmental power and nothing else. We find no other provision in the charter which, by any possibility, can be held to authorize a contract upon this important and vital subject."

In the case of *Milwaukee Electric Railway & Lt. Co.* v. *Railroad Commissioner of Wisconsin*, 238 U. S. 174, there is a very clear statement of this rule follow-

ing the announcement in the Home Telephone & Telegraph case:

> "The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed. The principle involved was well stated by Mr. Justice Moody in *Home Teleph. & Teleg. Co.* v. *Los Angeles*, 211 U. S. 265, 273, 53 L. ed. 176, 182, 29 Sup. Ct. Rep. 50."

A consumer may contend that this provision in the ordinance establishing maximum rates amounts to a contract on behalf of the company in consideration of the grant, that it will at no time charge in excess of the rates prescribed therein. To sustain this position and to maintain that such constitutes a valid contract he must take the further position that this would not prevent the city from exercising its governmental power to regulate the rates. If his position is true, however, and the city in the exercise of this power deemed it for the best interest of the city that the rates should *be raised*, yet the company could not obey such command of the city because it agreed it would never charge in excess of the pre-

scribed rate. It then necessarily follows that to adopt the construction that Section 3 of this ordinance constitutes a contract binding upon this company, the effect is to abridge the right of the city to regulate the rates by prescribing a raise thereof. In this connection we must bear in mind that the prohibitions found in Section 725 of the Code is that this power to regulate and fix rates "shall *not be abridged* by ordinance, resolution or contract." Certainly any construction that restricts the exercise of this power in any way the duly authorized legislative department of the city might deem to be best, must be treated as an abridgment and consequently within the prohibitions of the statute.

This power of government delegated to municipalities, is with the view that its exercise shall be for and in the interest of the people and the property within the city. When this power is exercised the municipality must necessarily affect both the rights of persons and the rights of property. The exercise of this power will permit the collection of tolls which is akin to the levying of a tax. Such power must therefore be exercised with a view that there shall be taken from the customer, pursuant to the exercise of this power, only a just toll which is compensated for by the service rendered. At the same time the exercise of this power by the municipality fixes the compensation that the public serving company shall receive for its property delivered to another. This involves also the exercise of a power of government that in the effect amounts to taking the property of another. It then necessarily follows that the city must, in its ex-

ercise of this power, take from the public serving company its property only upon just, fair and equitable terms, producing just and reasonable compensation. It seems clear to me that a municipality vested with this high prerogative of government must exercise it as a sacred trust. All authorities agree that this power is a continuing power and when we bear in mind the sacred character of the trust reposed, we may clearly see that it is the duty of the city to exercise that power and lower the rates when such is the correct procedure and that it is clearly the duty of the city to raise the rates when such would be the just and correct course. It then necessarily follows that any construction that would affect the right of the city to raise the rates would be an abridgment of the rights conferred.

The language of Section 3 indicates clearly the purpose upon the part of the City of Chariton in adopting the same as a part of the ordinance, to exercise its power to regulate the maximum rates to be charged in accordance with the opinion of the city based upon existing conditions. The language employed is that of command, its phraseology is legislative in character. In this connection we should have in mind the provisions of Section 12 of the ordinance. It will be observed, by the terms of this section, that it requires the grantee to furnish verified statements to the City Council of the City of Chariton once each year when demanded, showing the gross and the net earnings of the grantee in the operation of the business. The object of this section is to make provision for keeping the City of Chari-

ton informed at regular intervals of the exact income the company obtains in the operation of its business. The income received by the company is through collections made by it for service rendered under the rates prescribed by the city. There could be no possible object in the City of Chariton keeping informed as to this income, except for the purpose of enabling such city to exercise, at such time as it should desire, its power to revise the schedule of rates. A provision of this character will be found in nearly every legislative enactment throughout the country where provision is made for regulating and controlling public serving companies. Provisions requiring railways and other common carriers to make reports respecting sources of income and other matters the subject to regulation, are found in the Acts of Congress dealing with the regulations of Inter-State Commerce. Such provisions are also found in nearly every state enactment dealing with this important subject. When we have in mind the grant of power made by the Legislature of Iowa under Section 725, to regulate and control rates to be charged by public serving companies we are really driven to the conclusion that the purpose of the City of Chariton, as expressed throughout the ordinance in question, was to exercise this power. When we refer to Section 9 of this ordinance we find provision is made for an adequate service covering the entire city and that the service must be rendered during the day time and at night. In Section 8 we observe provisions regulating the conditions upon which it was deemed, by the city, extensions of service

would be proper. It could not be apprehended at the date of the passage of this ordinance the extent to which extended service might be found to be necessary to come within these conditions. It necessarily follows that it could not have been then apprehended by the city the amount of investment that would be ultimately required nor could it have been known the relation the income therefrom would have to the investment required. It is quite clear that this condition alone might produce changed situations calling for the exercise of the power of the city to change the compensation the company should receive. Viewing the ordinance in its entirety we believe there is a clear negativing of any purpose upon the part of the city to do more through the instrumentality of Section 3 of the ordinance than to regulate the rates to be charged as then appeared to be proper.

Where there is delegated to a city the power to make a binding contract for a rate to be charged consumers throughout the life of a franchise, the consumer becomes beneficially interested and the city could not raise such rate without the consumer's consent.

When the city exercises this power of government to fix rates, insofar as the same shall apply to private consumers, such act is for the benefit of the consumers and the company. When this power is once exercised, the consumer may exact service for the price fixed and the company may exact payment at the price so fixed. We must bear in mind in this connection that under the provisions of Section 720 of the Code above quoted, the

company has no option but to serve all consumers and this service must be given to all alike and upon identical terms. It seems then clear to me, that when this power is exercised and we concede that it is for the benefit of both the company and the consumer, that if we are to construe it as a contract, the consumer has a right to insist that the contract shall not be broken. Under such an interpretation the consumer may claim that a contract was made for him and the city has not the right to unmake such contract without his consent. Clearly, this is an abridgment of the power given by Section 725 of the Code and violates the prohibitions of this section. There are not many cases to be found where the question of the right of the consumer to maintain a contract fixing rates is involved. In the case of *Walton* v. *Proutt*, 174 S. W. 1152 (1153) we find the question involved. The court says:

> "We are of the opinion that appellant, as a citizen and user of water in the city, has a right to maintain an action to compel the water company to comply with its contract. There are authorities which clearly sustain that view, and we think they are correct. I Farnam on Waters, 160, B; *Pond* v. *New Rochelle Water Co.*, 183 N. Y. 330; *Robbins* v. *Bangor R. & Electric Co.*, 100 Me. 496. The New York Court of Appeals, in the case cited above, based its conclusion on the ground that the contract was made for the benefit of the citizens of the municipality, and that a citizen had a right to sue on the contract. The Maine court based its conclusion on the ground that mandamus was the proper remedy to compel the performance of the contract, and that an individual had the right to sue

to compel the performance of the public duty. Both of those decisions distinguish the question of the right of a citizen to sue for damages resulting from a breach of the contract."

The case of *Pond* v. *New Rochelle, supra,* is perhaps the most satisfactory case upon this subject. In that case, found in 76 N. E. 211 (213), the following appears:

"The general principle that, if one person contracts for the benefit of a third person, such third person may maintain an action on the agreement, has been applied since early in the seventeenth century in a large number of cases; the facts in each differing, to some extent. The leading case in England is *Dutton* v. *Pool*, 1 Vent. 318, 332, decided in the reign of Charles II. * * *

(214) The principle established by this case has been applied to contracts entered into by a father for the benefit of his daughter and by a husband for the benefit of his wife. As to the latter instance, see *Buchanan* v. *Tilden*, 158 N. Y. 109, 44 L. R. A. 170, 70 Am. St. Rep. 454, 52 N. E. 724. In the case before us we have a municipality entering into a contract for the benefit of its inhabitants, the object being to supply them with pure and wholesome water at reasonable rates. While there is not presented a domestic relation like that of father and child or husband and wife, yet it cannot be said that this contract was made for the benefit of a stranger. In the case before us the municipality sought to protect its inhabitants, who were at the time of the execution of the contract consumers of water, and those who might thereafter become so, from extortion by a corporation having granted to it a valuable franchise extending over a long period of time. We are of the opinion that the complaint states a good cause of action."

We contend from the foregoing that it clearly appears that at the time this ordinance was passed, the City of Chariton did not have the power to enter into a contract fixing maximum rates, but that it possessed the power to fix, establish and regulate rates. It is then our contention that the act of the city in adopting Section 3 of this particular ordinance was an exercise of this legislative power and cannot be construed as a contract.

II.

The United States Supreme Court will, in the construction of a state statute granting powers to a municipality, follow the interpretations given to such statutes by the highest court of the state.

The courts of the United States in all cases depending upon the meaning of the statutory enactments of states will adopt the construction which has been given by the highest courts of the particular state as to such statutes, unless the construction is in conflict with the constitution, laws or treaties of the United States. Under our dual system of government it must be conceded that the Federal Courts are vested with an independent jurisdiction to administer state laws and that this jurisdiction is co-ordinate with the jurisdiction of the courts of the several states and it is not at all subordinate to such jurisdiction. We find therefore that we have two co-ordinate jurisdictions administering the same law in the same territory and this endangers unseemly conflicts with possible resulting contrary conclusions respecting

identical facts covered by identical law. This situation has always required the exercise of the most perfect mutual respect by each jurisdiction towards the other. In a sense it is somewhat inconsistent to say that two entirely independent and co-ordinate jurisdictions are, in fact, co-ordinate respecting their powers of administration of the same law and that one must necessarily follow the other. Fortunately, however, our courts, both Federal and State, have succeeded in avoiding the unseemly conflicts that one might contemplate could possibly result from this dual system of court jurisdiction. In cases where contracts have been entered into between parties and rights have accrued to them or either of them under state statutes, the Federal Courts are not bound to follow the State Courts in cases where the particular contracts and rights thereunder were passed upon by the District Court of the United States at a time when there had been no construction of the statute given by the State Supreme Court, or when the question involved the impairment of an existing contract by reason of subsequent legislation. The Federal courts always should, and of course, will, in obedience to Section 10 of Article I of the Federal Constitution, protect the litigants from the impairment of obligations under contracts by the subsequent legislative enactment of any state. When this phase of the question, involving as it does a matter governed by the supreme law of the land, is not in the record of the case, the Federal Courts will lean towards the final adjudication of the state courts where the question might not be free from doubt, or will be bound to follow the adjudica-

tions of the state supreme court. In cases involving matters of purely local law, depending upon the construction of state statutes, delegating powers in local, political subdivisions of a state, the Federal Courts are bound to follow the interpretations and constructions placed thereon by the highest court of the particular state. To determine the exact rule that should be applied to a correct solution of our problem we must look to the record of our particular case.

The provisions of the Federal Constitution prohibiting state legislation impairing contracts, not involved.

That a grant of power made by ordinance of a municipality, upon the authority of the supreme legislature of a state, when duly accepted by the grantee will constitute a contract, is not disputed by any one. When this power is vested in a city to make the particular grant upon such conditions as it may see fit to impose, conditions always become a part of the contract and of course are binding upon all parties. This contract then cannot be interfered with, nor can the obligations of the parties under the same be impaired by any subsequent enactment of the supreme legislature or the municipality acting pursuant to and within its delegated power. In order, however, that there shall be such a contract there must have been, in the first instance, power vested in the legislative department of the municipality to make the contract. In the case at bar the City of Chariton had power under the provisions of Section 720 hereinbefore quoted, to grant authority now claimed by the

Southern Iowa Electric Company to use the streets for the transmission of electric current. It would grant this authority for a period not exceeding twenty-five years and the term expressed in such grant for any period of years less than this limitation upon power would constitute a contract. At the same time the city could not prescribe conditions making them a part of a binding contract, if such conditions involved the surrender of the exercise of a power of government vested in it, unless the authority so to surrender was clearly given by the supreme legislature. The authorities to which attention has been heretofore called clearly sustain these views. The City of Chariton claims, in the first count of its answer, that Section 3 of the ordinance in question constitutes a valid contract and that rights of the city became vested and that such rights would be now impaired if the court should hold that no contract existed. Section 725 of the Iowa Code vests in the municipality of Iowa, the power to regulate, control and fix rates and this is clearly the vesting of a governmental power. Unless this grant of power, authorized clearly and indisputably, the municipalities to bind themselves by irrevocable contracts there can be no contract made. The legislature of this state, however, saw fit to emphasize this well understood and clearly recognized principle of law, by coupling with the granting of power to the municipality, a prohibition that this power could not "be abridged by ordinance, resolution or contract." This supreme precaution arises undoubtedly because theretofore there existed authority to surrender this governmental power by contract.

The Federal courts are bound by the construction given by the Supreme Court of Iowa upon Section 725 of the Code respecting the power of cities to fix rates.

The question involved in this case and at the very foundation of its correct solution is whether or not the City of Chariton had power to make a binding contract respecting rates to be charged by this public serving company. It is simply a question of whether or not the State of Iowa, in the exercise of its sovereignty, saw fit to delegate a particular power to some political subdivision of the state. It cannot be doubted that the State of Iowa has a perfect right to say for itself what powers it will wish to give to municipalities. It would certainly result in the most unseemly and embarrassing situations if the state itself could not absolutely and finally determine just what powers it had given to municipalities, in absence of a well founded contention that there was a conflict with the contract clause of the Federal Constitution. This principle is announced in *Old Colony Trust Company* v. *Omaha*, 230 U. S. 100 (112). In the Old Colony case this court was called upon to determine the duration of a franchise grant and the solution of the question depended upon the construction of a statute of the State of Nebraska granting power to municipalities in that state. The portion of the opinion applicable to our question is as follows:

> "What was the life or duration of the privilege granted by the ordinance? Was it in perpetuity or for the corporate existence of the grantee? There is no claim, nor could there reasonably be, that it was during the pleasure of the city, or revo-

> cable at will. The Trust Company contends that it was a grant in perpetuity, and the city that it was for the corporate existence of the grantee. While the arguments have taken a wide range, it is of first importance to give attention to the statutes and decisions of Nebraska, because the city, being a creature of that state, derives its powers from the laws thereof and is necessarily within the influence of the decisions of the state's court of last resort."

This court then directs attention to the holdings of the State Courts of Nebraska upon the subject and proceeds:

> "To the state decisions here cited, counsel for the city interposes the objection that they are not well grounded, and that some of them go beyond what is expressed in the syllabus. We need not say more of the first branch of the objection than that, as the decision relates to matters of local law, namely, the construction of the state constitution and statutes and powers of local municipal corporations, they must be regarded by us as controlling, when their application involves no infraction of any right granted or secured by the Constitution of the United States. • • •
>
> In view of the facts in the present case, as before recited, these decisions of the Supreme Court of the state are conclusive upon the question of the right of the Trust Company to have the distribution of electric current for power and heat treated as included within the franchise contract of 1884 while it continues in force.

The facts in the case at bar do not warrant a contention that there is involved a condition running counter to any of the provisions of the federal constitution.

We have purely and simply a question of the extent of the power that was granted by the legislature to the City of Chariton. The opinion of this court in the case of *Claiborne County* v. *Brooks,* 111 U. S. 400 is directly in point upon this question:

> "It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal construction of the body politic of the state. But as all or nearly all of the states of the Union are sub-divided into political districts similar to those of the country from which our laws and institutions are in a great part derived, having the same general purposes and powers of local government and administration, we feel authorized, in the absence of local state statutes or decisions to the contrary, to interpret their general powers, in accordance with the analogy furnished by their common prototypes, varied and modified, of course, by the changed conditions and circumstances which arise from our peculiar form of government, our social state and physical surroundings."

This court has always been careful in dealing with this delicate question and in nearly every case directs attention to the fact that the powers of the Federal Court are co-ordinate with and not subservient to the powers of state courts, yet has always announced a determination to follow the state law and the constructions thereon, given by the Supreme Court of the state when not

in violation of the federal constitution, laws and treaties. This question has been before the court in numerous rate cases. In the case of *Milwaukee Electric R. & L. Co.* v. *Rd. Co.,* 238 U. S. 174 the following quotation will be found pertinent to this question:

> "It is true that this court has repeatedly held that the discharge of the duty imposed upon it by the Constitution to make effectual the provision that no state shall pass any law impairing the obligation of a contract requires this court to determine for itself whether there is a contract, and the extent of its binding obligation; and parties are not concluded in these respects by the determination and decisions of the courts of the states. While this is so, it has been frequently held that where a statute of a state is alleged to create or authorize a contract inviolable by subsequent legislation of the state, in determining its meaning much consideration is given to the decisions of the highest court of the state."

In the case of *Freeport Water Company* v. *Freeport,* 180 U. S. 587, the statute involved was not altogether clear as to whether or not the power to make a contract respecting rates was given to the city. This court, however, followed the construction of the state courts of Illinois.

In the case of *Richmond* v. *Smith,* 82 U. S. 429, we find the following announcement:

> "Suppose, however, the exceptions to the judgment are sufficient to raise the questions which the defendants desire to present for decision, still the court would feel constrained to affirm the judgment upon the ground that the Supreme Court of

the state have decided in an analogous case that the corporate authorities of the city had authority under the charter of the city to make the order for the destruction of the liquors and to give the pledge for payment, and that the defendants are responsible for the value of the liquors destroyed under that order. State courts certainly have a right to expound the statutes of the state, and having done so, those statutes, with the interpretation given to them by the highest court of the state, become the rules of decision in the federal courts."

In the case of *Burgess* v. *Seligman*, 107 U. S. 20 the question under examination received a clear analysis and exposition:

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State

Constitutions and Statutes. Such established rules are always regarded by the Federal courts, no less than by the State Courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrine of commercial law and general jurisprudence. So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid and in most cases do avoid any unseemly conflict with the well considered decisions of the State Courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states, was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and ex-

> pressions used in previous decisions. The principal cases bearing upon the subject are referred to in the margin, but it is not deemed necessary to discuss them in detail."

In the Seligman case attention is directed to the fact that the question of construction was open. In the case at bar the statute involved in the controversy, received construction from the highest court of the state. In the different cases coming before the Supreme Court of Iowa wherein this question was involved, the conclusions of the court have been uniformly in accord with the contentions we are making. The Supreme Court of Iowa in several cases commencing at a time prior to the happening of any of the events involved in this controversy, held that under section 725 of the code, cities had the power to regulate and control rates and that under section 473 of the Code of 1873 the cities had the power to agree by contract as to rates and that since the adoption of section 725 of the Code that the right to agree by contract did not exist. It is clear, from the history of the legislation of this state, from the wording of the statute itself and from the construction given by our State Supreme Court that the power of contract did not exist. The language of the statute in force at the time of the adoption of the ordinance in question, as the same was construed and interpreted by the Supreme Court, in a sense became a part of the instrument and in so far as it may be construed to be a contract became a part of the contract. This observation clearly brings us within the rule in the Seligman case:

> "Since the ordinary administration of law is carried on by State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state and have all the effect of law, and which it would be wrong to disturb."

It would be a serious interference with the ordinary adminstration of law in this state, and result in producing an extremely chaotic condition, if the charters of a large portion of the public serving companies of the state should receive a final adjudication in the Supreme Court in accordance with the rules it has declared and then in a few instances a contrary rule should be established by the Federal Courts. In the Seligman case, *supra*, reference is made to the condition, that where controversies or transactions occur and are involved in a case in the District Court of the United States and up to the time the Federal Court construes the question, there has been no adjudication in the state courts. The Supreme Court will then claim the right to itself, to disregard the rulings of the State Court. The situation in this state, however, will not permit the application of this rule. The Supreme Court of Iowa had declared long before the adoption of the ordinance in question in the case of *Cedar Rapids* v. *Cedar Rapids*, 144 Iowa 426, that the power to make a binding contract with respect to rates must be clearly given by the statute. This same holding was announced by the Iowa Supreme Court in a construction upon section 473 of the Code of 1873 in the case of *Independent District* v. *Le Mars Light & Water*

Company, supra. The opinion of the Supreme Court in the case of *Tipton* v. *Tipton Light & Heating Company, supra,* was filed on May 10, 1916. The opinion in the case of *Iowa Railway & Light Company* v. *Jones Auto Company, supra,* was filed by the Supreme Court of Iowa on October 25, 1917. The opinion in the case of *Town of Williams against Iowa Falls Electric Company, supra,* was filed on February 17, 1919. All of these cases involved specifically the question presented in the case and all of the opinions were filed before decree was entered by the District Court of the United States in this case. It appears from the record of this case (p. 45 Rec.) that the memorandum opinion of the learned judge of the District Court who tried this case was filed on March 24, 1919 (256 Fed. p. 929). The decree in this case was filed on the 3rd day of July, 1919, (p. 69 Rec.). We have therefore a clear pronouncement in the statutory law of Iowa, containing a specific prohibition against the making of contract respecting rates and a uniform line of construction by the highest court of the state in exact accord with the contentions we are making. Surely this situation requires that the Supreme Court shall lean to the construction given by the Supreme Court of Iowa.

III.

The court should not have ordered a submission of the case under Equity Rule 29, upon the issue made by plaintiff's petition and amendments and the first count of defendant's answer.

This cause was set down for hearing on order of court upon the first count of defendant's answer, admitting the allegations of plaintiff's petition and amendments respecting the business of the plaintiff and the passage of the ordinance. There is one paragraph in the answer of defendants similar to the language of demurrer, alleging that the petition and amendments do not entitle the plaintiffs to the relief demanded. This order should not have been entered by the court in the absence of a specific allegation in the first count of the answer, that the allegations in the petition and amendments, at least material to the main question of the case, were true. It is a fact, however, that the first count of the answer does not deny the allegations of the petition and amendments, that the income under the rates prescribed by Section 3 of the ordinance were insufficient to meet the operating expense. The rules of practice for the courts of equity of the United States are designed to simplify the practice in courts of equity of the United States and certainly have had that result. It may be doubtful in this case whether under the allegations of the petition the defense set forth in count one of the answer could have been made by demurrer or plea under the old practice. If it should be contended in this case that the issue determined by the court could not, in fact, have been determined by demurrer or plea under the old practice, then clearly the court erred in disregarding the request of plaintiff for the trial of all the issues of fact.

IV.

The enforcement of Section 3 of the Ordinance would violate provisions of the Federal Constitution.

Under the allegations of plaintiff's petition, it clearly appears that the income derived from the rates prescribed by section three of the ordinance are insufficient to meet the operating expense. If the Southern Iowa Electric Company is compelled to continue rendering service to the inhabitants of Chariton upon the rates prescribed in such section of the ordinance, it will be required to pay for the privilege of delivering current to consumers. The delivery of electric current to consumers is the delivery of property. The requirement, that a public serving company shall furnish electric current for less than cost, when so required pursuant to a legislative enactment, amounts to the taking of property of the company without compensation. As we have seen, the adoption of section 3, was the exercise of the legislative power of the City of Chariton and by its terms the city exacts the performance of service for less than the cost thereof. The right of the plaintiff to pursue the remedy sought for in this case is sustained by the announcement in Home Telephone case and other cases hereinbefore cited.

We submit therefore, that the decree of the District Court of the United States, for the Southern District of Iowa, should be reversed and that such decree be ordered by this court as will preserve to the appellant all of its rights at law and in equity; that the cause should be remanded to the lower court with directions to set aside

the decree from which this appeal was taken and afford appellant an opportunity to have the procedure to which it may be entitled under the allegations of its petition.

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